The OPINION of
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

{ United States of America, and Gary Jones, Revenue Officer of the Internal Revenue Service, v James E. Carter and Shirley L. Carter, case No. 92-2511, filed March 17, 1993, per curiam.}

Shirley Carter and her husband James Carter appeal the district court's[1] order granting the petitions to enforce Internal Revenue Service (IRS) summonses filed by the United States and IRS officer Gary Jones. We affirm.

On January 11, 1989, in furtherance of his investigation into their tax liabilities, Jones hand-delivered attested "Income Tax Return" summonses (IRS Form 6638) to each of the Carters. The forms indicated that the IRS was investigating income tax liability for the years 1983 through 1987, "for which year(s) no return(s) ha(d) been made." The forms

stated that the requested information was necessary for the IRS to prepare federal income tax returns for these years, and sample blank tax returns were attached.

After the Carters refused to comply, Jones filed enforcement petitions in the district court. Following a hearing, the magistrate judge made the following factual findings: (1) the IRS was investigating the Carters' possible tax liability for the years 1983-1987; (2) Jones served attested copies of the summonses on the Carters; (3) the Carters did not comply with the summonses; (4) the information was not in the possession of the IRS and was "material and necessary to properly investigate" their potential tax liabilities; (5) Jones had followed the required administrative steps; and (6) the IRS had not recommended criminal prosecution of the Carters to the Justice Department. The magistrate judge determined that Jones had thus made a prima facie

showing that service of the summonses was in good faith; the Carters argument that the federal government does not have authority to levy and collect taxes from individuals was meritless; and the summonses should be enforced.

The district court adopted the magistrate judge's recommendation over the Carters' objections, and entered an order directing the Carters to comply with the IRS summonses. The Carters unsuccessfully moved the court to modify the judgment and to dismiss. On appeal, the Carters challenge the district court's jurisdiction to review Jones's petitions, as well as the court's enforcement of the IRS summonses.

The district court had jurisdiction to review the petitions. "If the taxpayer refuses to comply with [an IRS] summons, the United States may seek judicial enforcement . . . in the appropriate federal district court which 'shall have

jurisdiction . . . to compel such attendance, testimony, or production of books, papers, or other data.'" United States v. First National Bank, 727 F.2d 762, 763 (8th Cir. 1984) (quoting 26 U.S.C. §§7402(b), 7604(a)).

The record supports the district court's determination to enforce the summonses. Under 26 U.S.C. #7602 (a)(1), the IRS has the authority to summon a taxpayer to provide information "[f]or the purpose of . . . making a return where none has been made, [or] determining the liability of any person for any internal revenue tax." The Carters never countered the IRS's allegation that they did not make tax returns for the years in question.

After careful review of the record, we conclude that Jones established a prima facie showing that service of the summonses was made in good faith by establishing that: the investigation was conducted for the

legitimate purpose of ascertaining the Carters' possible income tax liability; the inquiry into items that could reflect their income was relevant to that purpose; the information was not already within the IRS's possession; and Jones had taken the required administrative steps. See Tax Liabilities of John Does v. United States, 866 F.2d 1015, 1018 (8th Cir. 1989).

As the arguments raised in this appeal are frivolous, and we have many times so held, we award a sanction in the form of damages in the amount of $1500 against appellants. See Denison v. Commissioner, 751 F.2d 241, 242 (8th Cir. 1984) (per curiam), cert.denied, 471 U.S. 1069 (1985); Hansen v. United States, 744 F.2d 658, 660 (8th Cir. 1984) (per curiam); see also Coleman v. Commissioner, 791 F.2d 68, 72 (7th Cir. 1986). Damages and costs are authorized by both 28 U.S.C. # 1912

and Federal Rule of Appellate Procedure 38.

> The doors of this courthouse are of course open to good faith appeals of what are honestly thought to be errors of the lower courts. But we can no longer tolerate abuse of the judicial review process by irresponsible taxpayers who press stale and frivolous arguments, without hope of success on the merits, in order to delay or harass the collection of public revenues or for other nonworthy purposes.

Denison, 751 F.2d at 242-43 (quoting Granzow v. Commissioner, 739 F.2d 265, 269-70 (7th Cir. 1984) (per curiam)).

[1] The Honorable Dean Whipple, United States District Judge for the Western District of Misso adopting the findings and recommendation of the Honorable John T. Maughmer, United States Magist Judge for the Western District of Missouri.

Order denying Rehearing

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

{United States of America v. James Carter and Shirley Carter, case number 92-2511WMKC}

Appellants' pro se petition for rehearing has been considered by the Court and is denied.

April 16, 1993.

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Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

{United States of America v. James Carter and Shirley Carter, case number 92-2511WMKC}

The suggestion for rehearing en banc is denied as untimely.

June 2, 1993

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

{United States of America v. James Carter and Shirley Carter, case number 92-2511WMKC}

PETITION / MOTION FOR REHEARING EN BANC

The appellants do hereby Petition/Move the court to rehear this case en banc pursuant to Rule of Appellate Procedure #35 to review the significant question of whether the Internal Revenue Service is still restricted by the Due Process clause of the Constitution of the United States.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING EN BANC

INTRODUCTION

This case originated with the IRS filing a Petition to enforce an administrative summons pursuant to 26 USC 7602. The respondents (Carters) noted the Petition did not identify any tax that was being pursued nor did it aver any statute that was suggested to impose a lawful

duty/responsibility upon the Carters. The Carters filed a Motion for a Bill of Particulars requesting the omitted statutes be cited to properly prepare a defense. The motion was denied. A motion to dismiss for failure to state a cause of action was also denied.

The lack of identification of statutory authority for a specific tax, and a statute that imposes a lawful duty/obligation/responsibility of that tax upon the Carters has been the only issue raised by the Carters. The questions permeate the record; the grounds for denial, if any, ceaselessly change. It is contended that omission of this authority results in:

1) a denial of due process.

2) it does not fulfill the legislated requirements of the statute that authorizes the enforcement of the IRS summons.

3) it constitutes a breach of the requirements to evidence the constitutional jurisdiction of the court.

4) it fails to state a cause of action.

The Opinion of the Court, after detailing the action in the District Court, gives its legal reasons for affirming the District Court's decision in three paragraphs. The first paragraph discusses jurisdiction, the second discusses the statutory authority to compel books and records, and the third paragraph discusses a prima facie case. An analysis of each paragraph appears to be in order.

PARAGRAPH ONE --- JURISDICTION

The court quotes 26 USC ##7402(b) and 7604(a), as reproduced in United States v. First National Bank, 727 F2d 762, to suggest a proper exercise of jurisdiction. A significant clause has been inadvertantly excised from the statutes quoted: the district court "shall have jurisdiction by

appropriate process to compel such attendance, testimony, or production of books, papers, or other data." (emphasis added) It is apparent that jurisdiction is contingent upon conditions, i.e., appropriate process, among other things. It appears that appropriate process would include, as a minimum, compliance with constitutional provisions of due process.

Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise. Kinsella v US, 361 US 234; Snyder v Massachusetts, 291 US 97, 105. If a lawful responsibility is not averred in the petition, and a tax is not identified, the position of a respondent becomes untenable. He is denied an opportunity to challenge any accusation because, as in the instant case, there has never been an accusation, nor is there any

indication of what is going to be "proven" at any subsequent hearing.

Regardless of what facts are evidenced during any subsequent hearing, they could be held to fulfill legal requirements---which have never been identified---and the respondents are left with no recourse. "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise..." Garrett v Louisville NR Co, 235 US 308, 312. To render a judgment on an issue that is not within the pleading to which he has not consented to litigate is contrary to fundamental principles of justice. Coe v Armour Fertilizer, 237 US 413, 426. "The plaintiff's allegations must, if proved as

laid, be such as to show as a matter of law, the essential elements of a cause of action in his favor." 61A Am Jur2d, Pleading #71.

Let us be candid: The petition is styled as an enforcement of a summons, but it is a tax that is being enforced and the tax is not even identified in the petition, nor are the Carters told why they must pay the unidentified tax. How this can be rationalized as exhibiting "fundamental fairness" escapes the Carters.

Various aspects of due process requirements were detailed in eight pages of the Carters' Brief. The government's brief used four pages to assert the mere attachment of their summons as an exhibit to the petition was sufficient notification of the tax being pursued, but was unable to cite even one supportive authority. The court, by silence, upheld the government's position.

Even if congress were to amend the statutes to read as the court's abbreviated

citation, the constitutional requirements of due process would still be applicable. ref. US v Euge, 444 US 707, 710. Constitution rights cannot be amended/ negated by mere legislative fiat. If it were otherwise, congress could negate by legislation all constitutional rights. Constitutional rights are established to be beyond the casual power of governments to alter. Vanhorne's Lessee v Dorrance, 2 US 304; Muller v Oregon, 208 US 412.

But this is not even the jurisdictional question raised in the Carters' Brief (pp 22-24) and overlooked by the court. Not only must congress have legislated jurisdiction as in statutes #7402 and #7604 discussed above but authorization from the people for the pursuit of any governmental action must be found within the Constitution. McCulloch v Maryland, 17 US 316. Our form of government is one of restricted authority, and only what authority is granted within the constitution

can be exercised by government. Marbury v Madison, 5 US 137. The requirement that the collection of revenue must be traceable to constitutional authorization was specifically noted by the Supreme Court. United States v Hill, 123 US 681; 686. Not only does the petition in question make no attempt to identify constitutional authorization for a tax, but it makes no effort to even identify a tax. Discussion of this constitutional requirement can be found in credible legal authorities: 20 Federal Procedure, LEd, Internal Revenue, #48:1288; The Constitution of the United States of America, U.S. Government Printing Office, 1973, pp 597, 598. The Supreme Court recently reiterated the lack of inherent authority within the IRS. US v LaSalle National Bank, 437 US 298.

PARAGRAPH TWO --- SUMMONS AUTHORITY

The court makes an initial statement that "the IRS has the authority to summon a

taxpayer to provide information." The court has hereby assumed, without any legal justification, a significant legal conclusion: that the status of "taxpayer" has been established.

Taxpayer, as used in conjunction with Title 26, has a specific legal meaning pursuant to 26 USC #7701 (a)(14): that the individual is subject to an internal revenue tax. The courts have held that such an appellation is not to be imposed without legal justification. Sprechles Sugar v McClain, 192 US 397: Economy Plumbing v US, 470 F2d 585; Botta v Scanlon, 288 F2d 504. The government's brief attempted the same labeling on the apparent justification that the Carters were respondents in a civil action. The Carters vigorously objected. Ref. Reply Brief, p6. It appears the court would impose the appellation without showing any statutory justification.

The court cites 26 USC # 7602(a)(1), but quotes #7602(a), as authorization to enforce the IRS summons. In fact, the summons power is found only in #7602(a)(2); #7602(a)(1) authorizes the secretary to examine. #7602 is composed of at least three facets with paragraph one quoted by the court containing the purposes the secretary is to fulfil. The Carters have no challenge to the purposes of a summons; only the who is challenged. The delineation of who can be required to do what is described in subsequent paragraphs.

Two meanings of liable were distinguished in seven pages of the Brief. 1). There is a liability-by-law that only a governmental body can establish or alter. Giaccio v Pennsylvania, 382 US 399; Kay v US, 303 US 1; Phillips v CIR, 283 US 589; Smietanka v Indiana Steel, 257 US 1; CIR v Wheeler, 324 US 542; Bob Jones University v Simon, 416 US 725. (The concept of a

liability-by-law was adjudicated, but the phrase is original). 2). There is a liability-in-fact, which only a non-governmental entity can alter by the circumstances of its activities. Where liability can be altered/evidenced by an examination of books and records (as in the purpose quoted by the court), it is a question of liability-in-fact. In the instant case, the Carters have consistently requested the government to show a statutory lawful duty that the Carters have violated--a liability-by-law.

If the appellation of taxpayer is lawfully established, the qualification of who can be summoned by #7602 is altered. If you are a taxpayer, you have been determined to be liable(-by-law); if liability(-by-law) has yet to be shown, you are not a taxpayer. A fair reading of who can be summoned to produce books and records for examination by the Secretary is

submitted to be: "(T)he Secretary is authorized....to summon the person liable for tax ...to produce such books, papers, records, or other data..." (emphasis added.)

As was analyzed in the Brief, #7602 was compiled in 1954 from statutes that for 90 years had required the person summoned to be shown liable-by-law, and that the 1954 recompiling did not legislate any material change in these sections; this historic intregral component of who can be required to produce books and records has never been intentionally removed by legislation. This analysis was unchallenged by the government. (The detailed analysis was on pages 12 and 13 of the Brief and, along with the Brief's appendix, is appended to this Petition.) The government has made no effort to show the Carters are liable-by-law, and it is submitted that lacking such showing, #7602 does not authorize the court to enforce their summons on the Carters. For a court

to enforce a summons without showing the citizen has a lawful duty to pay a tax (a liability-by-law) is submitted to not comply with the legislated intent of #7602. The intent of the legislation is what will be enforced by the courts. US v Euge, 444 US 707.

(The cases of US v McAnlis, 721 F2d 334; US v Allshouse, 622 F2d 53; and US v Raabe, 431 FSup 424; and US v Barrett, 837 F2d 1341, were distinguished in the Brief and Reply as being adjudicated on issues of liability-of-fact and not on issues of liability-by-law and are hence irrelevant to the instant adjudication. The Opinion did not rely upon them.)

The court concludes the paragraph with "The Carters never countered the IRS's allegation that they did not make tax returns for the years in question." It is respectfully submitted the court has mis-stated the parties' legal responsibilities.

The IRS has never made any averment that the Carters have a lawful duty to make tax returns. Due process makes it the responsibility of the movant to put all essential elements of a claim into the Petition where they can be contested. Hill v Mendenhall, 88 US 453. The respondent has no responsibility to disprove nebulous claims that may be inferred or deduced from a pleading and much less to rely on assumptions from attached exhibits. Garrett v Louisville NR Co., 235 US 308; ref 61A Am Jur2d Pleading #32.

Does a naked claim of summons authority under #7602 satisfy the requirements of due process? Of course not! The proofs must go to matters set up in the pleading or the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. Garrett v Louisville & NR Co., 235 US 308, 310, 313; Hill v Mendenhall, 88 US 453,

455. "The allegations of a pleading must be sufficient to avail the pleader...and give the opposite party notice of the contemplated proof...A party should plead that which he must prove." 71 CJS Pleading #6. The "proof" evidenced at the hearing consisted of bank records the government's advocate declared would show the Carters had income that exceeded statutory minimums. Transcript p.7, L24. The statutory minimums, for whatever tax, if they exist, have never been seen, even after the Carters moved to have them put into the Petition. The proof at the hearing does not relate to any averment within the petition. "A variance between pleading and proof that affects the substantial rights of parties is ground for reversal." 32 Am Jur2d, Federal Practice #386, citing Berger v US, 295 US 78.

The petition in this case merely states an investigation of federal tax liability, a

nebulous generality, is the purpose of the summons. "(P)rocess which is a mere gesture is not due process." Mullane v Central Hanover Bank, 339 US 306, 315. In Bell v Burson, 402 US 535, the court stated: "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision...does not meet (the standard of Mullane). id 542. Surely the petition must include the essential elements as in a hearing since the hearing is to "prove" the petition. To meet the requirements of due process, the notice must be reasonable and adequate for the purpose, due regard being given to the nature of the proceedings and the character of the rights which may be affected by it. Dohony v Roger, 281 US 362; Goss v Lopez, 49 US 565.

PARAGRAPH 3 --- PRIMA FACIE

The paragraph relies on the US v LaSalle National Bank, 437 US 298 and US v

Powell, 379 US 48, standard of legitimate purpose to suggest a prima facie case has been shown. The "legitimate purpose" was extensively analyzed in the Brief to show a reference to a specific identified tax for which legal responsibility was clearly established. The analysis was not challenged by the government. Legal responsibility has never been averred or documented in this case. How a prima facie case, or a legitimate purpose, can be established when no lawful duty is documented escapes this writer. (ref. Texas v Burdine, 450 US 248), but it is submitted the issue does not rise to a level suitable for a court en banc. (US v Powell's adjudication of affidavits was also extensively analyzed in the Reply Brief and shown to be applicable only to issues of facts.)

An assumption that the respondent cannot defend on the merits is not proper.

Coe v Armour Fertilizer, 237 US 413, 424. The IRS is fully aware a constitutional defense may be presented. It is twisted irony that the government has repeatedly made the erroneous accusation that the Carters claim "there is no provision in the Internal Revenue Code that actually imposes an income tax on them." G. Brief 7, yet they obstinately refuse to put their documentation in the Petition.

SUMMARY

It is submitted that the issue, while legally styled as a question of due process, is one of whether the IRS is still subject to constitutional restrictions; the issue is untrammelled power. If basic constitutional rights, stemming from the 39th. chapter of the Magna Charta--"No freeman shall be taken, or imprisoned, or diseised, or outlawed, or exiled, or anywise destroyed, nor shall we go upon him, nor send upon him, but...by the law of the

land."-- cannot be obtained by litigation, then they obviously are not available to the citizens. If constitutional rights are unavailable, the constitution has become a worthless scrap of paper and our form of government has been fundamentally altered. If our government has been so changed, citizens should not be teased with sanctimonious platitudes as justice, liberty, and freedom. If government can force a citizen to preform an act, any act, without evidencing any legal justification for its requirement, we live in the land of the permitted, not the land of the free. We are permitted to be undisturbed in our homes, our person, our possessions, only if we servilely comply with the whim and caprice of an army of bureaucrats waving administrative forms but refusing to evidence their authority other than the power of confiscation, incarceration, and, ultimately, the muzzle of an agent's gun.

Let us pray our nation has not regressed to such a tyranny.

The Opinion suggested the issues raised herein are "stale", but their adjudication has not been brought to the attention of the Carters. If they are "frivolous" issues deserving punitive sanctions, then make the most of it.

RELIEF SOUGHT

It is respectfully submitted that the documentation herein shows good cause for this court to Order a Rehearing of the case and/or to reexamine the issues presented in the Briefs and/or any other procedural practices that might be appropriate, and that after such reexamination, this court will find that the following relief is proper and just:

1. That this court order the case be dismissed for lack of jurisdiction, or, in the alternative;

2. That this court order the case be dismissed for failure to state a cause of action (ref. 71 CJS, #232, Failure to State Cause of Action: Brief pp 21-22.): or, in the alternative:

3. That this court order the case be remanded with instructions that Plaintiffs be allowed to file an amended Petition;

4. That the respondents should recover the cost of this litigation;

5. That this court should Order such other relief the court deems appropriate.

Respectfully submitted,

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{appendix of 26 USC #7602 history omitted}

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

{United States of America and Gary Jones, Revenue Officer of the Internal Revenue Service, Petitioners, v James E. (Shirley L.) Carter, Respondents. Case number 89-W-149 (150) }

PETITION TO ENFORCE
INTERNAL REVENUE SERVICE SUMMONS

The United States of America and Gary Jones, Revenue Officer of the Internal Revenue Service, by their attorney, Robert G. Ulrich, United States Attorney for the Western District of Missouri, aver to this Court as follows:

I This is a proceeding brought pursuant to the provisions of sections 7402(b) and 7604(a) of Title 26, U.S.C., to judicially enforce an Internal Revenue Service summons.

II The petitioner Gary Jones is a Revenue Officer of the Internal Revenue Service,

employed in the Collection Division of the Office of the District Director of the Internal Revenue Service in St. Louis, Missouri located in Kansas City, Missouri and is authorized to issue an Internal Revenue Service summons pursuant to the authority contained in section 7602 of Title 26, U.S.C., and Treasury Regulations, section 301.7602-1, 26 C.F.R. § 301.7602-1.

III The respondent, James E. (Shirley L.) Carter, resides or is found at Route 1, Box 524, Harrisonville, Missouri, within the jurisdiction of the court.

IV Revenue Officer Gary Jones is conducting an investigation into the tax liability of James E. (Shirley L.) Carter for the taxable years ending December 31, 1983, December 31, 1984 and December 31, 1985, December 31, 1986 and December 31, 1987, as is set forth in the Declaration of Revenue Officer Gary Jones attached hereto as Exhibit A.

V The respondent, James E. (Shirley L.) Carter, is in possession and control of testimony and documents concerning the above-described investigation.

VI On January 11, 1989, an Internal Revenue Service summons was issued by Revenue Officer Gary Jones directing the respondent, James E. (Shirley L.) Carter, to appear before Revenue Officer Gary Jones on January 24, 1989 at 10:00 a.m., at 5800 E. Bannister, Room 312, Kansas City, Missouri, to testify and to produce for examination, books, papers, records or other data described in the summons. An attested copy of the summons was personally served on the respondent, James E. (Shirley L.) Carter, by Revenue Officer Gary Jones on January 11, 1989.

The summons is attached hereto and incorporated herein as Exhibit B.

VII On January 24, 1989, the respondent, James E. (Shirley L.) Carter, did not appear

in response to the summons. The respondent's refusal to comply with the summons continues to date as is set forth in the declaration of Revenue Officer Gary Jones attached hereto as Exhibit A.

VIII The books, papers, records or other data sought by the summons are not already in possession of the Internal Revenue Service. (sic)

IX All administrative steps required by the Internal Revenue Code for the issuance of a summons have been taken.

X It is necessary to obtain the testimony and to examine the books, papers, records or other data sought by the summons in order to collect the Federal tax liability of James E. (Shirley L.) Carter for the taxable years ending December 31, 1983, December 31, 1984, December 31, 1985, December 31, 1986, December 31, 1987, as is evidenced by the declaration of the petitioner, Revenue Officer Gary Jones, attached hereto and

incorporated herein as part of this petition.

WHEREFORE, the petitioner respectfully prays:

1. That this Court enter an order directing the respondent, James E. (Shirley L.) Carter, to show cause, if any, why he should not comply with and obey the aforementioned summons and each and every requirement thereof.

2. That the Court enter an order directing the respondent, James E. (Shirley L.) Carter, to obey the aforementioned summons and each and every requirement thereof by ordering the attendance, testimony and production of the books, papers, records or other data as is required and called for by the terms of the summons before Revenue Officer Gary Jones, or any other proper officer or employee of the Internal Revenue Service, at such time and place as may be fixed by Revenue Officer

Gary Jones, or any other proper officer or employee of the Internal Revenue Service.

3. That the United States recover its costs in maintaining this action.

4. That the Court grant such other and further relief as is just and proper.

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The Fifth Amendment of the Constitution of the United States of America reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 USC §7402(b). Jurisdiction of district courts to enforce summons.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data,

the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 USC §7604(a). Enforcement of summons, jurisdiction of district court.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

{United States v Shirley L. and James Carter, civil actions No. 89-W-149 and 89-W-150, filed Nov 14, 1991}

REPORT AND RECOMMENDATION

Petitioner Gary Jones, Revenue Officer of the Internal Revenue Service (hereinafter "Petitioner") in February of 1990 commenced these actions to seek judicial enforcement of Internal Revenue summons pursuant to Sections 7402(b) and 7604(a) of Title 26 U.S.C. against respondents James E. Carter and Shirley L.Carter (hereinafter "Respondents"). On April 11 and 12, 1989, these civil actions, Nos. 89-W-149 and 89-W-150-9, respectively, were referred to John T. Maughmer, Chief U.S. Magistrate Judge for processing and handling in accordance with the provisions of Rule 22 of the Local Rules of Procedure

of the United States District Court for the Western District of Missouri , Section 636, Title 28 United States Code, and the governing statutes and law.

The Respondents, on July 5, 1989, filed a motion for a more definitive pleading, a motion to dismiss and a motion to consolidate case 89-W-150-9 (U.S. v. Shirley L. Carter) with case number 89-W-149-1 (U.S. v. James E. Carter). These pleadings were filed in response to the Court's June 13, 1989 Order to answer the Petition to Enforce Internal Revenue Service Summons or raise proper affirmative defenses by or before July 7, 1989. On August 28, 1989, the Honorable Dean Whipple, United States District Judge, consolidated Respondents' cases, Nos. 89-W-150-9 and 89-W-149-1, and again referred these matters to Chief United States Magistrate Judge John T. Maughmer to conduct an evidentiary hearing on the Petitioners' motions to enforce compliance.

On October 5, 1989 Chief Magistrate Judge John T. Maughmer ordered that Respondents' motion to dismiss be denied and ordered that a hearing be held on November 28, 1989, on Petitioner's petition to enforce the IRS summons. Before the hearing respondents filed a motion to dismiss on November 14, 1989 submitting that the Petitioner had neither identified any specific tax sought to be imposed upon respondents, nor identified the statute imposing legal liability, thus preventing preparation of a meaningful defense and denying respondents due process.

An evidentiary hearing was held on November 28, 1989 before Chief Magistrate Judge John T. Maughmer to allow the parties to make any appropriate factual showings and offer any additional argument. Respondents Shirley L. Carter and James Carter appeared pro se. The United States appeared by and through its counsel, Kenneth Josephson.

Gary Jones, Revenue Officer with the Internal Revenue service, testified at the hearing.

FINDINGS OF FACT

The following are the proposed findings of facts based on the written record and the matters presented at the hearing on November 28, 1989.

1. The Internal Revenue Service is conducting an examination of the federal tax liability of Shirley L. Carter and James Carter for the 1983, 1984, 1985, 1986, and 1987 taxable years.

2. Gary Jones, employed as a Revenue Officer in the Collection Division of the Office of the District Director of the Internal Revenue Service, issued an Internal Revenue Enforcement Summons (Internal Revenue Service Form 6638) to respondents on January 11, 1989 in pursuit of this investigation.

3. An attested copy of the summons was served on respondents by Officer Jones who left the summons at the last and usual place of abode of Route 1, Box 524, Harrisonville, Missouri 64101 (sic). The summons required respondents to appear before Officer Jones at 10:00 a.m., January 24, 1989, to give testimony in respect to their tax liability for the taxable years ending December 31, 1983 through December 31, 1987, and to produce the books, records, papers, and other data specifically identified in the summons for examination.

4. The respondents did not appear before Officer Jones on January 24, 1989, and have not appeared subsequent to that date.

5. None of the information sought by the summons is in the possession of the Internal Revenue Service.

6. The data sought by the summons (testimony, books, records, papers, and other data) is material and necessary to properly investigate the Federal income tax liability for the taxable years ending December 31, 1983 through December 31, 1987. This information (testimony, books, papers, records, and other data) should reveal items of income, expenses, and deductions of the taxpayers, assist in reconstructing the taxpayers' income, and provide the specific amount of the business deduction to which respondents may be entitled.

7. The administrative steps required by the Internal Revenue Code were followed in the issuance of the summons.

8. The records sought by the summons are not already in the possession of the Internal Revenue Service.

9. There is no Department of Justice referral in effect, as defined by Section 7602(c) of the Internal Revenue Code (26 U.S.C.), and there has been no recommendation made by the Internal Revenue Service to the Department of Justice for criminal prosecution of the taxpayer.

Prior to amendment by the Tax Equity and Fiscal Responsibility Act of 1982, Section 7602, Title 26, United States Code, authorized the Secretary of the Treasury or his delegate to issue summonses in connection with the determination of tax liability and collecting any such liability. The 1982 amendment of Section 7602 expanded the purposes for which a summons my (sic) be issued to include any inquiry into any offense connected with the administration or enforcement of the internal revenue laws.

Senate Report No. 97-494, at pages 285 and 286, contains the following statement in regard to the reasons for changing Section 7602:

> Under LaSalle, the Secretary may not use an administrative summons once the internal (orig) Revenue Service has referred a case to the Department of Justice for prosecution or has made an institutional commitment to refer case to the Department for criminal prosecution. This rule has spawned protracted litigation without any meaningful results for the taxpayer. Yet, summons enforcement proceedings should be summary in nature and discovery should be limited. See United States v. Kis 658 F.2d 256 (7th Cir. 1981). Therefore, the restrictions under present law on the use of administrative summonses once the Internal Revenue Service has made an

institutional decision to abandon pursuit of a civil tax determination or collection, or has made an institutional commitment to refer a case to the Justice Department, have encouraged wasteful litigation.

Many tax investigations by the Internal Revenue Service have both civil and criminal aspects. The committee believes that a clear definition of when the power to issue an administrative summons exists and when it does not exist in cases with a criminal aspect will simplify administration of the laws without prejudicing the rights of taxpayers.

To permit the drawing a clear distinction, it was necessary to expand the purposes for which an administrative summons may be issued by the Internal Revenue Service.

In United States v LaSalle National Bank, 437 U.S. 298 (1978), the Supreme Court, in reversing the denial of enforcement of an Internal Revenue Service summons on the ground that it was not issued in good faith because the investigation was solely for the purpose of gathering evidence for use in a criminal prosecution, enunciated the several requirement for enforcement of a summons issued pursuant to Section 7602 as it then existed. Those requirement are:

> First, the summons must be issued before a recommendation by the Internal Revenue Service to the Department of Justice for criminal prosecution.
>
> Second, the Internal Revenue Service must at all times use the summons in good faith, pursuant to the Congressionally authorized purpose of 26 U.S.C. Section 7602, and this requires compliance with the standards of United States v. Powell, 379 U.S. 49, 57-58 (1964), which are

that: (a) the investigation will be conducted pursuant to a legitimate purpose; (b) the inquiry may be relevant to that purpose; (c) the information sought is not already within the Commissioner's possession; and (d) the administrative steps required by the Code have been followed; and

Third, the Internal Revenue Service must not have abandoned, in an institutional sense, the pursuit of civil tax determination or collection. Fd.(sic) at 318.

In its discussion of the issue involved in LaSalle, the Court stated that by including the authorization for issuance of summonses in the Internal Revenue Code, Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined. When an investigation examines the possibility of criminal misconduct, it necessarily inquires

about the appropriateness of assessing the 50 percent civil tax penalty. In short, Congress has not categorized tax fraud investigations into civil and criminal components, and any limit on the good faith use of an Internal Revenue Service summons must reflect this statutory premise. Because criminal and civil fraud liabilities are coterminous, the Internal Revenue Service rarely will be found to have acted in bad faith by pursuing the former. However, a delay in submitting a recommendation to the Department of Justice, merely because the Service would like to gather additional evidence for prosecution, and the good-faith standard will not permit the Internal Revenue Service to become an information-gathering agency for other departments.

Petitioner seeks judicial enforcement of the Internal Revenue summons, arguing that it is necessary for respondents to

comply with the summons, requiring testimony and production of all documents, to properly investigate the respondents' federal tax liability for taxable years ending December 31, 1983 through December 31, 1987 and the Internal Revenue Service does not possess the requested documents.

The summons issued to respondents satisfies the statutory requirements of Section 7602 as interpreted by the Supreme Court in United States v Powell, 379 U.S. 48 (1964). The three administrative steps are to protect taxpayers from unnecessary and overzealous intrusion. The first, that the summons be issued for a legitimate purpose, is satisfied because the summons was issued to assist the IRS determination of the tax liability of respondents for the years 1983, 1984, 1985, 1986 and 1987. The second, that the inquiry be relevant to the stated purpose, is satisfied. The relevancy test for information in an internal Revenue

Service summons is whether the summons seeks information which might throw light upon the correctness of taxpayer's return. Matter of Newton, 718 F.2d 1015 (11th Cir. 1983). The third element, that the Internal Revenue Service not possess the records is satisfied by the statement and representation of the Internal Revenue Service to that effect.

Respondents also argue that the Federal Government does not have the authority to levy and collect income taxes from individuals. This argument is patently without merit. Respondents also argue that the Internal Revenue Service Summons is a "General Warrant" and prohibited from enforcement. The summons is not a "General Warrant", but is a specific request of all documents, books, papers and records that the respondent possess or control reflecting income received for the years 1983 through 1987. In United States v. First National Bank of Mitchel, 691 F.2d 386 (8th Cir.

1982) the Court recognized the ability of the Internal Revenue Service to gather information to ascertain the correct tax liability of an individual. Respondents' argument that the summons is a general warrant must fail.

United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980) held that in determining whether to enforce a summons a court is required to evaluate the government's good faith. This approach has been cited with approval, and followed, by the Eighth Circuit in United States v. Swanson, 722 F.2d 440, 441 (8th Cir. 1985). The present case has no credible showing of lack of good faith by the Internal Revenue Service in its issuance of the summons. The Internal Revenue Service is conducting a bona fide investigation into the tax liability of respondents for several years. Revenue Officer Jones is authorized by Section 7602 of Title 26, U.S.C. and

Treasury regulations, Section 301.7602-1, 26 C.F.R. § 301.7602-1, to issue an Internal Revenue Service summons. All administrative steps required by the Internal Revenue Code for issuance of a summons have been taken.

The petitioner satisfied the LaSalle National Bank requirements with evidence introduced during the November 28, 1989 hearing. It is recommended the summons be enforced and the respondents be ordered to comply with the summons and furnish the necessary testimony, papers, records, documents and books. This summons, properly issued and sufficient on its face, allows the Internal Revenue Service to properly investigate whether the respondents have incurred any federal tax liability for any of the taxable years ending December 31, 1983 through December 31, 1987.

For the above reasons, it is the RECOMMENDATION of the undersigned that the Court, after making its own independent

review of the record, enter an order directing compliance with the summons on a date and at a time agreed upon by Officer Gary Jones and the respondent but not later than sixty (60) days after the service of any such order directing compliance with the summons upon respondents Shirley L. Carter and James Carter. It is further

ORDERED that the Clerk of the Court serve a copy of this Report and Recommendation upon respondents Shirley L. Carter and James Carter by first class mail and certified mail.

All parties and counsel are hereby reminded that each has ten (10) days from the date of receipt of a copy of this Report and Recommendation to file and serve specific written objections to the same. A failure to file and serve objections timely may result in a waiver of appeal from the report and recommendation and any order of

the Court adopting all or a portion of this Report and Recommendation.

John T. Maughmer (signed)
Chief U.S. Magistrate Judge
Kansas City, Missouri